
DUAL TRANSFERS IN REAL ESTATE: LEGALITY OF SEPARATE SALE OF BUILDING AND UDS

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ABSTRACT

With the rapid growth of real estate sector, a unique concept of dual ownership emerged, particularly in relation to apartments and multi-unit buildings. In various instances, the property owners have begun selling the units in the built-up apartments to one individual and the corresponding undivided share of lands to another. The Undivided Share of Land (UDS) refers to the proportionate share of underlying land that is allotted to each apartment in a building. For example, in a 40-unit apartment building, the land below it is notionally divided into 40 equal parts, each corresponding to one such unit. The owner of such apartment or building has absolute right over those units and the area underneath the building. Now arises a question as to whether the owner of the building is entitled to sell the apartment unit and the undivided share of land separately to different individuals? While there is no concrete ruling by the courts as to prohibiting or permitting such transfer, varied approaches have been taken upon this issue. This article seeks to explore the legal validity of dual transfer by examining judicial precedents, statutory provisions and underlying principles of property law in India.

Keywords: Undivided Share of Land (UDS), Apartment Ownership, Immovable Property, Dual Ownership, Transfer of Property, Building and Land Ownership.

Introduction:

The concept of ownership in property law traditionally provides for an individual to have sole and absolute authority over the residential unit (structure) and the land underneath it. However, with an increasing complexity of urban development, a novel form of dual ownership has emerged, wherein the apartment (structure) and the land underneath i.e. undivided share of land (UDS) are treated as separate components. Undivided Share of Land refers to the underlying land of a building assigned proportionately to each apartment owner, basing upon the total units of the project.

Though the definition of UDS is nowhere explicitly defined, Black's law dictionary defines "Undivided Right" as '*an undivided right or title, or a title to an undivided portion of an estate, is that owned by one of two or more tenants in common or joint tenants before partition*'¹, whereas the Law Dictionary defines "Undivided Interest" as '*an ownership claim of property or assets commonly owned with restricted claims but no one has exclusive claim*'.² From the above definitions it can be inferred that undivided share or rights or interest over the land cannot be claimed exclusively by a single owner of a joint property.

Surprisingly, a growing number of owners, builders and developers of the buildings or residential units, are now transferring these units and UDS separately to different individuals. This raises a critical legal question – Can the building and the UDS be sold independent of each other? While there is no express statutory prohibition on such bifurcated transfers, a close examination of statutory framework and judicial precedents is essential to determine their legality and consequences.

Statutory Framework:

Section 2(26) of General Clauses Act, 1897³ defines "immovable property" - shall *include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth*; It states that immovable property includes, land, benefits arising out of land, and the things which are attached to the earth. Additionally, Section 3 of Transfer of Property Act, 1882⁴ defines "attached to the earth" as '*.....(b) imbedded in the earth, as in*

¹ Black's Law Dictionary, 1697, 4th ed. 1968

² The Law Dictionary, <https://thelawdictionary.org/undivided-interest/>, 07-08-2025

³ General Clauses Act, 1897, S. 2(26), No. 10, Acts of Parliament, 1897 (India)

⁴ Transfer of Property Act, 1882, No. 4, Acts of Parliament, 1882 (India)

the case of walls or buildings; or (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached....’

Whereas, Section 3(h) of Tamil Nadu Apartment Ownership Act, 1994⁵ defines “*common areas and facilities*” unless otherwise provided in the Deed of Apartment, means- (1) the land on which the building is located; (2) the foundations, columns, girders, beams, supports, main walls, roofs, halls, corridors, lobbies, stairs, stairways, terrace, compound walls, fire escapes, wells, and sumps and entrances and exits of building;’ and Section 6 of Tamil Nadu Apartment Ownership Act, 1994⁶ mentions that ‘.....the percentage of the undivided interest in such common areas and facilities and the limited common areas and facilities shall not be separated from the apartment to which it appertains, and shall be deemed to be conveyed or encumbered with the apartment whether or not such interest is expressly mentioned in the conveyance or other instrument’.

From the above-mentioned statutory provisions, it can be inferred that buildings or structures by their nature of being attached to earth are included in the definition of ‘Land’ and they cannot be separated and sold independently from it. However, once the structure is severed from the land, the land can be transferred independently. Though, the statute allows interest of the parties to include their terms of intent, consequently it prohibits the sale of undivided interest of the land. Hence, it can be concluded from the statutory provisions that irrespective of whether by a deed or by a conveyance, once a person purchases an apartment the undivided interest of such shall be deemed to be transferred to him.

Legal Position:

1. **Faqir Chand Gulati v. Uppal Agencies (P) Ltd.,⁷ (2008) 10 SCC 345** - The Supreme Court of India, in this case mentioned that, once the landholder sells/transfers the land, each apartment owner becomes the owner of the apartment with corresponding undivided share in the land and an undivided share in the common areas of said building. The extracted para 20 of the judgment is as follows “(.....the landholder sells/transfers undivided shares in the land corresponding to the builder’s share of the building to the builder or his nominees. As a result each apartment owner becomes the owner of the apartment with corresponding

⁵ Tamil Nadu Apartment Ownership Act, 1994, S. 3(h), No. 7, Acts of Parliament, 1994 (India)

⁶ Tamil Nadu Apartment Ownership Act, 1994, S. 6, No. 7, Acts of Parliament, 1994 (India)

⁷ Faqir Chand Gulati v. Uppal Agencies (P) Ltd., (2008) 10 SCC 345

*undivided share in the land and an undivided share in the common areas of the building.....)*⁸

- 2. State Bank of Travancore v. State of Tamil Nadu⁹** - The Madras High Court in the present case held that, apartment owner is a person who owns the apartment and an undivided interest in the land, on which the building is located. It further held that, unless a person is an apartment owner and is in possession of the constructed area in the building, he cannot retain the undivided share in the land. The High Court held the sale deeds which were made by the Vendor selling the undivided interest in the land as invalid and held that only apartment owners are the sole proprietors of such undivided share of the land. The Court observed that

“Para 16. An apartment owner is a person who owns apartment and an undivided interest in the land, on which the building is located, and he has interest in the foundation, the basement.

Para 18. Admittedly, the vendor is not in possession of any constructed area. Therefore, in so far as the interspace where the pillars stand which is shown as car park in the sanctioned plan is concerned, respondents 4 to 14 are the exclusive owners. It cannot be called as “ground floor” it is only Car parking. As per the definition of this Act, the vendor cannot even be called as an apartment owner. To be an apartment owner, one must be owning an apartment and undivided interest in the common areas. Without owning any constructed area no one can have any interest in the common area.....

*Para 24. A person cannot retain any undivided share in the land unless he is an “apartment owner” and in possession of the constructed area in the building.....*¹⁰

- 3. Woodlands Estate Apartment Owners Association Jagathy v. E.S. Sabukuttan¹¹** - The Kerala High Court stated that, undivided share of land and the apartment can be sold separately by the apartment owners. It provided that, though morally such transfer is impermissible legally it is permissible. However, the person to whom such undivided share of land has transferred cannot file a suit for partition as long as the building is in existence,

⁸ Faqir Chand Gulati v. Uppal Agencies (P) Ltd., (2008) 10 SCC 345

⁹ State Bank of Travancore v. State of Tamil Nadu, 2003 SCC OnLine Mad 713

¹⁰ State Bank of Travancore v. State of Tamil Nadu, 2003 SCC OnLine Mad 713

¹¹ Woodlands Estate Apartment Owners Association Jagathy v. E.S. Sabukuttan, 2017 SCC OnLine Ker 7709

he can claim his share only when the apartment is demolished, and only then the holders of such undivided interest shall have the right to claim the partition with respect of their share.

The Court observed that – Para 16. *“At the same time, it is a matter of concern that the learned counsel for respondents 2 and 3 has pointed out that if every flat owners in the complex are permitted or allowed to transfer a fraction of their undivided interest over the property, that will invite disastrous consequences and every such transferees will forward a claim over the undivided shares in the property. On moral standards, the said argument seems to be correct. Legally speaking, one cannot stand in the way of such a transfer also. Even if such a transfer is made, the transferee is not going to get anything because of the fact that he cannot file a suit for partition so long as the building is there in the property. So long as the apartment as such is there, nobody can claim a specific share over the property, in which the apartment complex is situated and therefore, even in case of any such transfer of the fractional shares out of the undivided interest, there cannot be any disastrous consequence at all. In case, the apartment complex is not there, such transfer will lead to a situation, wherein, such transferees of fractional shares will get a right to have a partition by metes and bounds.”*¹²

Analysis:

Before arriving at the conclusion, it is pertinent to mention that Section 44 of Transfer of Property Act, 1882¹³ does not prohibit the transfer of undivided share held by the co-owner. Based on this principle, even if the building and UDS, are transferred to two different persons without any physical demarcation, the transferee of the UDS can only exercise his right by transferring his interest and cannot exercise exclusive rights over such undivided share of the land, as long as the building stands upon it. Therefore, though the owner of the building is entitled to transfer them separately leading to dual ownership, the transferee of the UDS cannot exercise their exclusive rights over the land as long as the building exists upon the land.

Conclusion:

The jurisprudence around dual ownership of apartments and land is currently marked by divergent judicial opinions. The Supreme Court and several High Court clearly ruled that an

¹² State Bank of Travancore v. State of Tamil Nadu, 2003 SCC OnLine Mad 713

¹³ Transfer of Property Act, 1882, S. 44, No. 4, Acts of Parliament, 1882 (India)

apartment and its corresponding undivided share in land are inseparable, and any transaction attempting to bifurcate them may be legally invalid. However, the Kerala High Court, have left the door open for such transfers under limited circumstances. Until there is a clear legislative mandate or authoritative ruling from a larger bench of the Supreme Court, this legal grey area is likely to continue, requiring parties to exercise caution and seek legal clarity before engaging in such dual transactions.